STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN FORREST JOHNSON,

Defendant-Appellant.

UNPUBLISHED
August 30, 2007

No. 271413
Antrim Circuit Court
LC No. 06-003966-FH

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering a building with intent to commit a felony or larceny, MCL 750.110, and two counts of larceny in a building, MCL 750.360. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve concurrent sentences of five to 30 years for breaking and entering, and five to 15 years for each larceny conviction, those sentences to run consecutively to an unrelated sentence. Defendant appeals as of right, raising two sentencing issues. We affirm defendant's sentence, but remand for the ministerial tasks of correcting the presentence investigation report (PSIR) and judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts

The prosecutor's theory of the case was that, in November 2005, defendant, while an employee of Maverick Metal Stamping, removed a digital camera from the premises, and then, the following month, shortly after being laid off, broke into the shop and removed a computer.

On appeal, defendant challenges none of his convictions, but instead argues that the trial court erred in basing its sentencing decision in part on defendant's refusal to admit his guilt, and in responding to a dispute over certain information in defendant's PSIR simply by notating by hand that defendant denied the allegation.

II. Refusal to Admit Guilt

We review a sentencing court's factual findings for clear error. See MCR 2.613(C); *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). However, the proper application

of the statutory sentencing guidelines presents a question of law, calling for review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

It is not in dispute that the sentencing guidelines were correctly scored, recommending a range for defendant's minimum sentence for breaking and entering of 19 to 76 months' imprisonment. The minimum defendant actually received, 60 months' imprisonment, fell within the guidelines. "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). However, an appellant may not challenge the scoring of the sentencing guidelines or the accuracy of the information used in imposing a sentence within the guidelines range unless the issue was raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed with this Court. MCL 769.34(10); MCR 6.429(C); *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

In this case, defendant exercised no mechanisms to preserve the sentencing issues. Hence, our duty is to affirm. In any event, we find no merit in defendant's position. At sentencing, defense counsel reiterated that defendant "does not acknowledge his . . . guilt of these particular crimes." Defendant himself stated, "I did not do these charges," adding, "I was wrong for possessing things that come to find out were stolen, which at the time I probably knew because the prices were low, but I didn't steel [sic] them. I didn't break into any building." In imposing sentence, the trial court stated, "when you commit the crimes and aren't in a position to acknowledge it, and express some remorse for it, it puts you in the position of someone who's pretty manipulative and deceitful."

A sentencing court "cannot base its sentence even in part on a defendant's refusal to admit guilt." *People v Yennior*, 399 Mich 892, 892; 282 NW2d 920 (1977) (memorandum order). "If, however, the record shows that the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to error requiring reversal." *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987) (Archer, J., joined by Griffin, J.). We have little doubt that, had the issue been raised below, the trial court would have clarified that it was speaking to its concerns for defendant's rehabilitation potential, not lengthening the sentence because defendant refused to admit guilt. For these reasons, we reject this claim of error.

III. Information in the PSIR

Defendant argues that the trial court failed to satisfactorily resolve a dispute he had with information contained within his PSIR. MCR 6.425(E)(2) provides as follows:

> If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information in the report, which is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the correct report before it is sent to the Department of Corrections.

In this case, defense counsel noted that the PSIR reported that defendant had a "psychiatric history," that defendant denied. Asked if he suffered from multiple-personal disorder, or schizophrenia, defendant replied, "I have epilepsy, I've never been psychiatrically treated for anything." Defense counsel suggested that the PSIR imputed to defendant facts about defendant's adoptive father. The PSIR reporter stated that this fact originated with an earlier PSIR. The trial court responded as follows:

> Let's do this. I'm going to make a notation on page 7 the Defendant denies any meaningful psychiatric history. So that when he gets down into the prison system there's no point in having him receive mental health services that he doesn't need. That hopefully will alert the Department of Corrections to check their records. There are other things you can accomplish in the prison system without sitting around talking to a psychologist about the schizophrenia he doesn't have.
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> . . . I want to bring it to their attention so if there's an error they can just correct it. I don't know if you have any or not. The problem . . . when you get sentenced as you have a number of times, the new reports build on the old reports. And at some point if some attorney of yours wasn't smart enough to bring this up to the judge it got accepted as gospel and continues to follow you around. You don't need to be in the psychiatric wing of a prison if you're not a mental patient.
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> . . . I'll put that denial down here. And I'm sure [the PSIR reporter] will flag this so the Department of Corrections doesn't—of course if you were schizophrenic and you were that other person right now, we wouldn't know.

Defense counsel accepted this result without comment, thereby failing to preserve objections to how the trial court responded to the dispute. Our review is thus limited to ascertaining whether there was plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecutor characterizes the trial court's response to the dispute as having corrected the PSIR, thus indicating that the prosecutor concedes that the challenged information should not stand. We agree with the prosecutor's implication that the trial court disregarded the accounts of mental illness in reaching its sentencing decision. But notating a denial while leaving the challenged information otherwise unchanged is not among the options authorized by MCR 6.425(E)(2).

"When a sentencing court states that it will disregard information in a presentence report challenged as inaccurate, the defendant is entitled to have the information stricken from the report." *People v Britt*, 202 Mich App 714, 718; 505 NW2d 914 (1993), citing MCL 771.14(5). In this case, although the trial court apparently hoped that exposing the dispute would lead to correction of all of defendant's penal records, defendant was and remains entitled to have the disputed information wholly stricken from his PSIR for this case. Accordingly, we remand this case to the trial court with instructions to strike the challenged information.

IV. Judgment of Sentence

Although the parties do not make issue of it, we take this opportunity to correct an error in the judgment of sentence. That document indicates that each of defendant's convictions resulted from a plea, instead of from a jury verdict. Accordingly, we hereby direct the trial court on remand to prepare an amended judgment of sentence reflecting convictions following from a jury trial.

V. Conclusion

We affirm defendant's sentence, but remand this case to the trial court for the ministerial tasks of correcting of the PSIR and judgment of sentence in conformance with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto